

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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6/16

76-1101

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1101

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES ROBERT THOMAS III,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

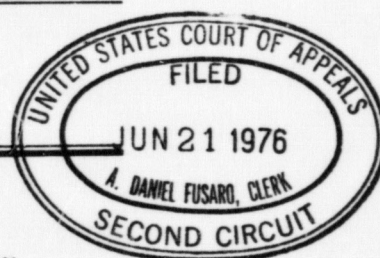


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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against -

75 CR 316

CHARLES ROBERT THOMAS,

Defendant.

----- x

United States Courthouse
Brooklyn, New York

January 2, 1976
10:00 o'clock a.m.

B e f o r e :

HONORABLE MARK A. COSTANTINO, U.S.D.J.

MICHAEL PICOZZI
Official Court Reporter

1 A P P E A R A N C E S :
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3

4 DAVID G. TRAGER, ESQ.,
5 United States Attorney for the
6 Eastern District of New York

7 BY: HERBERT JOHNSON, ESQ.,
8 Assistant United States Attorney

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HERMAN GRABER, ESQ.,
Attorney for Defendant

1 THE CLERK: Criminal motion, United States
mp/ss2 against Charles Robert Thomas.

3 MR. JOHNSON: Good morning, your Honor.

4 THE COURT: Good morning.

5 MR. GRABER: For the defendant, Siegel & Graber,
6 100 Church Street, by Herman Graber.

7 If your Honor pleases, as part of our motion we
8 had indicated we were attaching what we termed a
9 petition signed by the local fisherman in Easthampton
10 Township that wasn't attached to the papers.

11 Please forgive the paper it is written on.

12 THE COURT: Go ahead.

13 MR. GRABER: If your Honor pleases, this is a
14 motion for resentencing of the defendant. Basically
15 our brief submitted to your Honor says what I have to
16 say in this matter. I would just ask the Court to be
17 aware of the fact that present in Court today are
18 people who do business with Mr. Thomas, most particularly
19 two fishermen who gave up a day of fishing to be here,
20 two people that own fish businesses at the Fulton Fish
21 Market who the defendant Thomas does business with, and
22 various friends and members of his family all which
23 would be willing to answer whatever questions that your
24 Honor might have of them concerning the defendant, what
25 he is today and not what he has been, because obviously

1 we all concede what he has been.

2 The point I would like to make to your Honor is
3 this, the probation report that your Honor sent this
4 defendant spoke about a man that existed some year and
5 a half ago. I don't believe that that probation report
6 took into account what had occurred at the time of his
7 original incarceration under the state sentence.

8 If your Honor pleases, I believe your Honor
9 sentenced this defendant as a deterrence. This
10 defendant, when your Honor sentenced him, and to this
11 day has been deterred because of the previous sentence
12 under what in effect was the same charge.

13 The defendant did learn from that incarceration.
14 He served several months in the New York City
15 Reformatory for Men in Rikers Island which is perhaps
16 harder time to serve than in our Federal institution.

17 He then was released on an early basis where he
18 voluntarily served a year parole time.

19 And my question is, regarding the probation
20 report, why couldn't your Honor have the benefit of the
21 report written by probation officers from the State of
22 New York and the parole officer who worked with him a
23 year after he was released from the institution? Since
24 that time, your Honor, we are dealing with, in effect,
25 two different human beings. Here is a man who has

1 taken responsibility, gone into debt to create a
2 business and because of his business policies has
3 aided an industry, not a big industry by any means, not
4 a poor industry, except for those who are part of it,
5 but an industry in which the fishermen have consistently
6 been taken in by the middlemen -- and when his
7 appearance on the scene came about all of a sudden
8 their profits began to rise because he was willing to
9 take less and deal with them more fairly. They are
10 concerned about what is going to happen when his
11 business goes under.

12 If, in May, the defendant is not back at his
13 store, the business will have to go down, probably
14 even sooner. His wife is working with him but could
15 not handle that portion of the business which brings in
16 their greatest income, that is the transportation of
17 the scallops and so on from Easthampton into New York,
18 into the Fulton Fish Market. The defendant on a daily
19 basis wakes up at 1:30 in the morning and is in the
20 store 1:30 and 2:00 o'clock he's on the road to be at
21 the Fulton Fish Market to sell his fish.

22 His wife is incapable of doing that, she is not
23 physically strong enough. The children are willing to
24 help but obviously they are young and not as strong as
25 they could be and they do have their obligations to

1 school.

2 What I am concerned about, your Honor, is this,
3 if the business falls there is no other income for this
4 woman. While he was incarcerated on the state charge
5 his wife was receiving public assistance. If he goes
6 in now and the business falters, she will again have to
7 seek out public assistance.

8 The fishermen will suffer because they will then
9 be in the hands of those who have been stealing from
10 them for many, many years.

11 They are here and would be most happy to answer
12 any questions your Honor would have. They want to talk
13 to your Honor because they are quite concerned for
14 themselves.

15 One of the recommendations in the old probation
16 report is that he is a danger to society. I submit
17 that at least this portion of society feels quite the
18 opposite.

19 I submit to your Honor the society in which he
20 is directly living in at this particular moment feels
21 that rather than being a danger he is a benefit to
22 them, someone who has dealt with them in an honest way.

23 I ask your Honor to reconsider for the hardship
24 to his family and other people, people whom your Honor
25 wishes to protect who are hard-working decent beings

1 who will suffer by his incarceration and suffer
2 because this business will falter.

3 THE COURT: You make it sound as though he were
4 indispensable to society. I don't know anybody in the
5 whole world that is, including myself.

6 MR. GRABER: He's not indispensable to society.

7 THE COURT: Rehabilitation started when he was
8 apprehended and he received tremendous consideration.
9 The consideration was being made in each and every
10 count with the exception of two, a 30-count indictment,
11 and he pleaded to seven counts, I believe it was.

12 MR. GRABER: Your Honor --

13 THE COURT: He could have faced five years on
14 each one which would have been thirty-five years. A
15 minimum would have been three years on each.

16 The Court has been tremendously lenient.
17 Society is owed something in this case. A lot of
18 people lost quite a bit in this case. It cannot go
19 unpunished.

20 MR. GRABER: I am not asking you to --

21 THE COURT: If he is away from his business one
22 day it could destroy it.

23 MR. GRABER: I am not saying that either.

24 THE COURT: You take issue with the position
25 of the probation department in this case and you say

1 they were unfair to this defendant. I reviewed it
2 again. I don't find any unfairness in the probation
3 department. They tried to be as objective in the
4 situation as they could considering the amount of
5 charges against him. Consideration was given to him
6 and consideration was given the letters the Court
7 received. the fact that he didn't cooperate or the
8 cooperation was too late --

9 MR. GRABER: Your Honor, Number One, the
10 defendant was apprehended some two years ago.

11 THE COURT: Yes.

12 MR. GRABER: At that time, he was sentenced by
13 three separate judges of the State Supreme Court who
14 had what I think was probably the more serious of the
15 charges because I think a gun is far more serious --

16 THE COURT: They were considerate.

17 MR. GRABER: Correct. But they had a reason in
18 my opinion for being so considerate.

19 THE COURT: I can't go on hindsight.

20 MR. GRABER: The point is this, that the reasons
21 why these judges who are fair minded, decent people,
22 as you are --

23 THE COURT: Thank you.

24 MR. GRABER: They had some information about him
25 which your Honor does not possess. Otherwise, why would

1 they show him that type of consideration? They didn't
2 have to bargain with him as your Honor didn't have to
3 bargain.

4 THE COURT: Maybe you should look at the other
5 side of the coin. Maybe they knew he was being charged
6 in the Federal Court and the State Court thought they
7 would let the Federal Court take care of these people.

8 MR. GRABER: That could be easier done by
9 allowing the Federal Court to dispose of the matter,
10 but the point is this, that is not what their reason
11 was. I don't think the indictment existed at the time
12 he was sentenced. It did not come to pass until after
13 he was released and after he started his business. The
14 State Court, all they had before them was the three
15 separate serious charges.

16 THE COURT: And they gave him tremendous
17 consideration.

18 MR. GRABER: From which he benefited. He didn't
19 take advantage of it. He worked after he received it.
20 There were two letters sent to the presiding Judge
21 attached to our papers which indicate the state of mind
22 that that defendant was in at the time he was sitting
23 in the Long Island City Jail which is probably the
24 worst of the prisons in the State of New York and
25 thanking the Judge for putting him there. This case

1 didn't exist at that time. This was done --

2 THE COURT: You mean the charges against him
3 didn't exist? But he knew about the case. He
4 definitely knew about the case. He was the ring
5 leader

6 MR. GRABER: There was another indictment pending
7 against him.

8 THE COURT: We will agree on that.

9 MR. GRABER: As far as a layman is concerned, we
10 can assume he wasn't aware of it. This was done out of
11 gratitude to the judges because what happened was he
12 realized what he had become and how he had to change.

13 Now, he gets out of prison and for the past year
14 and a half there isn't the slightest blemish on this
15 man's record. He impressed the people of the new
16 community that he moved to. Remember, he moved into
17 what is considered a rural area and has quickly been
18 accepted by the old-timers in that area. And he is
19 respected by them. They are willing to come to Court.
20 They are willing to take a day off. These are not
21 rich people, they are poor people. They are willing to
22 come to Court and tell the Court -

23 THE COURT: I have no issue with the community
24 that wants to help a person doing good. But I have to
25 take issue with the fact I have an obligation and I

1 must perform that obligation. That is only because of
2 the seriousness of the crime. Because of what he has
3 taken from the people of other communities this Court
4 must do what is proper.

5 MR. GRABER: I agree.

6 THE COURT: If I were to let compassion alone
7 determine these issues, I would be in some trouble
8 every time I sat up here. You know that.

9 MR. GRABER: Here is an unusual situation, your
10 Honor, where a man has in effect already served a
11 sentence for the acts committed in the instant
12 indictment. He has benefited by that period of
13 incarceration. It's not a situation where you have a
14 man coming before you and you are taking a terrible
15 risk with the man, you are not quite sure he is going
16 to benefit by a break or not. Here you have a man --

17 THE COURT: I won't accept that recidivism for
18 the same crime is not high at all. I have been on the
19 bench for twenty years. I found there is good in
20 everybody, even the worst guy in the world there is
21 some good. I also found it is necessary for a Court to
22 do what its obligation mandates.

23 MR. GRABER: We can't do it blindly. We can't
24 take a situation where he fits into a mold especially
25 when the evidence here indicates that there is something

1 unusual about this situation. Your Honor knows at
2 this particular point that for the past year and a half
3 since his release from prison this man has led an
4 unblemished life. It's not a situation where he gets
5 out of jail and recommits a crime. He has not committed
6 a crime of any kind since the date of his release and
7 since during the time of his incarceration.

8 THE COURT: That was taken into consideration.

9 MR. GRABER: This man has shown an ability to
10 reform himself. What in effect incarceration would be
11 would be to put him back to a year and a half ago. He
12 would lose his business. The fishermen will survive --
13 they may not survive as well. His family will suffer.
14 And in the meantime we are asking for the defendant --
15 you have been in prison once before and you straightened
16 yourself out, and now for no added act you are going
17 in again. And when you get out of prison you can start
18 again. You are asking him to start twice. You are
19 asking him to rebuild twice.

20 THE COURT: I think you are placing the onus
21 on the wrong man. I must do what is mandated under the
22 charge. Probation indicates there must be
23 incarceration. I have determined it's required that he
24 have some incarceration. It's not only rehabilitation
25 that we sent a defendant away for, there are loads of

1 them that will never be rehabilitated. But we keep
2 following a philosophy of trying.

3 Do you have anything to say, Mr. Johnson?

4 MR. JOHNSON: Yes. As your Honor knows, the
5 Government does not take any position. Particularly
6 because I was not the Assistant United States Attorney
7 at the time. I am sure your Honor is knowledgeable on
8 the matter.

9 However, at the time of the sentencing the
10 defendant's then attorney raised a question as to
11 whether there was cooperation offered by the defendant
12 and refused by the Government, and Mr. Graber has
13 included a reference in his papers to that offer.

14 Following the sentencing I spoke by telephone
15 with Mr. Stephen Behar who was the Assistant United
16 States Attorney in charge of the case. I spoke to him
17 again after receiving Mr. Graber's papers. Mr. Behar
18 stated to me there was an offer made by the Government
19 asking for cooperation at the time the case began and
20 it was refused.

21 At no time, and Mr. Behar was emphatic, no time
22 from that time until the end of the case was
23 cooperation offered or given by the defendant.

24 I feel I must bring that to the Court's
25 attention. Beyond that, of course, the Government has

1 no position.

2 MR. GRABER: Can I have a moment? Because I
3 think those facts will be in dispute.

4 The defendant's attorney, former attorney,
5 Mr. Steven Russo did --- I am repeating what Mr. Russo
6 said ---

7 THE COURT: I know what he said. I also know
8 what Mr. Behar said. Mr. Behar has had many sentences
9 before me where there was an indication of cooperation.
10 Mr. Behar would tell the Court. I have loads of
11 respect for Mr. Behar.

12 MR. JOHNSON: He indicated he would come in if
13 he had to.

14 THE COURT: I know the type gentleman Mr. Behar
15 is. I am going to reserve decision. I will look at
16 it closely.

17 I don't believe he has been treated unfairly
18 nor has the probation department been unfair in their
19 report. I find they were fair considering the
20 magnitude of the charges made against him. And I don't
21 think I have acted in a rash manner --

22 MR. GRABER: I don't feel your Honor has acted
23 in a rash manner. Based on the probation report your
24 Honor had your Honor has acted most kindly. And I mean
25 that in all sincerity. I do feel however regarding the

1 probation report, the allegation that at present he is
2 a danger to anybody is incorrect. It's based not on an
3 objective reason but totally a subjective one. That
4 is the point I wish to make to your Honor.

5 THE COURT: All right.

6 MR. GRABER: Further, if your Honor pleases, if
7 your Honor feels that some incarceration is required,
8 I am asking your Honor to consider the possibility of
9 his somehow splitting up the incarceration so that this
10 man can be back in time for the season to make a living
11 for his family and so that the Government is not
12 further burdened by supporting him in prison and his
13 family --

14 THE COURT: That is always the risk the
15 Government takes.

16 MR. GRABER: The point is, what I am concerned
17 about is his wife is a decent woman who has never been
18 involved.--

19 THE COURT: I have never known a family, and
20 that includes mothers and fathers and brothers and
21 sisters and wives who have not suffered because of
22 incarceration of their son or brother or husband.
23 They weren't responsible for the trouble he got into,
24 it's the individual who does it on his own character
25 which comes out in life. Sometimes it comes out at a

1 young age and sometimes it comes out when he's older.
2 I don't believe in blaming a wife or mother or father.
3 So that is my philosophy on the subject and I will
4 never change it. I've seen too many parents blamed
5 for what children have done.

6 I will reserve decision on this.

7 MR. JOHNSON: In passing, I just want to point
8 out that I intend to refer the letter of the fishermen
9 to the United States Attorney inasmuch as there may be
10 allegations concerning practices of other persons in
11 Easthampton -- if there are any violation of Federal
12 law.

13 THE COURT: That is not the purpose of the
14 letter. The purpose of the letter was to show he was
15 a good businessman.

16 MR. GRABER: This man has changed that practice
17 in a substantial way. These people are here and they
18 would love to talk to you.

19 THE COURT: I am not here for sentencing. I
20 will reserve decision on the Rule 35. I will have it
21 by Monday. He is to report Monday morning.

22 MR. GRABER: Yes. What time would that be?

23 THE COURT: About 11:30 Monday morning.

24 MR. JOHNSON: The defendant is scheduled to
25 surrender on Monday by 4:00 o'clock.

1 THE COURT: I know that.

2 MR. GRABER: We should be here 11:30.

3 THE COURT: If you want to call --

4 MR. GRABER: No, we will be here.

5 Thank you very much.

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LAW OFFICES
SIEGEL & GRABER

STANLEY L. SIEGEL
HERMAN I. GRABER

G 18

100 CHURCH STREET, NEW YORK, N. Y. 10007

(212) WORTH 2-1295

February 6, 1976

Hon. Mark A. Costantino
District Judge
United States District Court
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Charles Robert Thomas

Honorable Sir:

After reading the supplemental probation report, prepared for Charles Robert Thomas, on Monday January 26th, there are certain aspects that I should like to raise for your added consideration.

Basically, this new report substantiates that the position Robert Thomas has assumed in his community, since his prior incarceration, is as advanced in our Rule 35 motion. However, two matters at the end of the report seem to need further explication. I refer, first, to the newly discovered arrests. It should be pointed out that both of these took place as incident to Mr. Thomas' employment as manager of the Moon Restaurant, a bar, in East Hampton, New York. I have been informed further by Mr. Thomas that the incident arose because he was forced to eject two intoxicated patrons from those premises. He vehemently denies that there were any "deals" made to withdraw the complaint or to have the charges dismissed. In any event, it is to be noted that even this matter, involving a violation and a misdemeanor, took place at a time prior to his state incarceration.

The last paragraph of the report indicates that I represented to the Court that the State Supreme Court Justices who sentenced Mr. Thomas took into consideration the charges now pending. I have no recollection of ever

February 6, 1976

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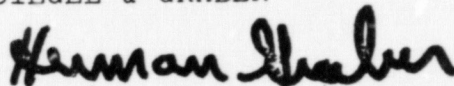
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having said that or of having written that, either implicitly or impliedly. The facts are and were that neither Mr. Thomas, nor his lawyers at that time, nor the courts, nor anyone else for that matter, knew of the federal offense now before your Honor. The defendant was not even formally charged with these crimes until almost one year after he was released from prison, which would have been almost two years from the time of his sentencing. If the Court has a recollection that it was in any way implied that the federal case was taken in consideration by the Supreme Court of the State of New York, I wish to withdraw it immediately. However, I firmly believe that no such claim was ever made, or even implied.

If I can be of any further assistance to your Honor regarding this matter, please contact me at your earliest convenience.

Respectfully yours,

SIEGEL & GRABER



HERMAN I. GRABER

HIG:lr

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

----- EVELYN COHEN -----, being duly sworn, says that on the 16th-----
day of June, 1976-----, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a ~~GOVERNMENT'S APPENDIX~~-----
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

----- Siegel & Graber, Esqs. -----

----- 100 Church Street -----

----- New York, N. Y. 10007 -----

Sworn to before me this
16th day of June, 1976

----- Evelyn Cohen -----

Carolyn N. Johnson
Notary Public, State of New York
No. 41-4510298
Qualified in Queens County
Term expires March 31, 1977

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4510298
Qualified in Queens County
Term expires March 31, 1977

BEST COPY AVAILABLE